



Administrative, Litigation, and Third-Party Records

James Coggeshall
Sean Nottingham
Assistant Attorneys General
Open Records Division
Office of the Attorney General

“Views expressed are those of the presenters, do not constitute legal advice,
and are not official opinions of the Office of the Texas Attorney General.”



Administrative Exceptions

- ▶ Gov't Code § 552.103
- ▶ Gov't Code § 552.107
- ▶ Gov't Code § 552.111



Section 552.103 - The Litigation Exception (Slide 1 of 3)

What it does

- ▶ Exempts from disclosure information related to civil or criminal litigation involving a governmental body, or its employees in their employment capacity, that was pending or reasonably anticipated on the date the governmental body received the request for information



Section 552.103 - The Litigation Exception (Slide 2 of 3)

What must you demonstrate?

- ▶ Litigation was pending or reasonably anticipated on or before the date you received the request for information
- ▶ **Pending:** provide sufficient evidence to demonstrate litigation is pending
- ▶ **Anticipated:** provide “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture”
- ▶ How the information at issue is related to the pending or reasonably anticipated litigation



Section 552.103 - The Litigation Exception (Slide 3 of 3)

What it doesn't do

- ▶ Does not except "basic information" under *Houston Chronicle*
- ▶ Does not except information that has either been obtained from or provided to the opposing party in the litigation, after the commencement of the litigation posture
- ▶ Does not make information subject to 552.022 confidential
- ▶ Does not provide a compelling reason to overcome 552.301 procedural violation

Remember: This is a *discretionary* exception to disclosure.



Common Issues with Section 552.103

- ▶ TTCA notice sent or lawsuit filed after the date the request was received is insufficient
- ▶ A potential opposing party publically threatening to sue or hiring an attorney does not meet the reasonably anticipated standard
- ▶ If your governmental body is not a party to the litigation, you must send a representation from the governmental body that is a party to the litigation that wants the information to be withheld



Section 552.103 - The Litigation Exception: Hypothetical #1 (Slide 1 of 3)

- ▶ Homer Simpson was cruising the streets of downtown Springfield, Texas when a city bus, driven by Otto Mann, failed to yield the right-of-way and hit Homer's car. As Homer is being carried away on a stretcher, he tells Otto, "I'll sue you for this!"
- ▶ A few weeks later, Homer hires an attorney, Mr. Lionel Hutz, to help him pursue his personal injury claim. Mr. Hutz makes a written request to the city seeking all e-mails between Otto and Mayor Joe Quimby pertaining to the accident. The responsive information includes only one e-mail where Otto admits "I wasn't paying attention."
- ▶ The following day, Mr. Hutz sends a Notice of Claim letter to the city that meets the requirements of the Texas Tort Claims Act (TTCA).



Section 552.103 - The Litigation Exception: Hypothetical #1 (Slide 2 of 3)

- ▶ The city timely requests an OAG ruling and claims section 552.103 for the information. In its 15-day brief, the city argues it anticipates Homer will file a lawsuit against the city because Homer publicly threatened to sue and hired the attorney who made the request for information. The city also argues that it has received a Notice of Claim letter from Mr. Hutz on behalf of Homer. The city explains the requested information directly relates to the anticipated litigation.
- ▶ The city also sends Mr. Hutz copies of its 10- and 15-day briefs.
- ▶ Will the city be able to withhold the requested information under section 552.103?



Section 552.103 - The Litigation Exception: Hypothetical #1 (Slide 3 of 3)

- ▶ No. The city may not withhold the responsive e-mail under section 552.103 as it has not established litigation was reasonably anticipated on the date the city received the request.
 - Although the city received a Notice of Claim letter which met the requirements of the TTCA, it was received the day after the request for information.
 - Additionally, a potential opposing party publically threatening to sue or hiring an attorney does not meet the reasonably anticipated standard. Objective steps towards filing a lawsuit must be taken.

Tip: Other exceptions may apply. Be sure to assert all applicable exceptions even if you believe one is dispositive.



Section 552.103 - The Litigation Exception: Hypothetical #2 (Slide 1 of 2)

- ▶ The following week, Mr. Hutz sent a written request to the city seeking information pertaining to accidents involving city buses.
- ▶ The city timely requests an OAG ruling and claims section 552.103 for the information. In its 15-day brief, the city affirmatively states it has received a Notice of Claim letter compliant with the TTCA from Homer prior to the date the request for information was received. The city explains the requested information directly relates to the anticipated litigation. The city also sends Mr. Hutz copies of its 10- and 15-day briefs.
- ▶ Will the city be able to withhold the requested information under section 552.103?



Section 552.103 - The Litigation Exception: Hypothetical #2 (Slide 2 of 2)

- ▶ Yes, the city may withhold the requested information under section 552.103 because:
 - The city complied with the requirements of section 552.301;
 - The city demonstrated it reasonably anticipated litigation by explaining it received a Notice of Claim letter from Homer compliant with the requirements of the TTCA;
 - The city explained the Notice of Claim letter was received before the city received the request for information; and
 - The city explained the requested information is related to the anticipated litigation.



Section 552.103 - The Litigation Exception: Hypothetical #3 (Slide 1 of 2)

- ▶ Mr. Hutz, through a great deal of hard work, discovered that Otto was involved in a previous accident in which he drove a city bus over Krusty the Clown's foot. Mr. Hutz sent a written request to the city seeking all documents related to the Krusty accident.
- ▶ Complying with all the requirements of section 552.301, the city requests a ruling from the OAG and claims section 552.103 applies to the requested information. In its brief, the city explains to the OAG it is a party to pending litigation (*Krusty T. Clown v. City of Springfield*), states the lawsuit was filed before the city received the request for the information, and explains the requested information relates to the pending litigation. The city also sends the OAG a copy of the original petition, which was filed in court six months ago, as proof litigation is pending.



Section 552.103 - The Litigation Exception: Hypothetical #3 (Slide 2 of 2)

- ▶ Will the city be able to withhold the requested information under section 552.103?
- ▶ Yes, the city may withhold the requested information under section 552.103 as it has shown it relates to pending litigation to which the city is a party.



Section 552.103 - The Litigation Exception: Hypothetical #4 (Slide 1 of 2)

- ▶ Mr. Hutz sends a written request to Sheriff Wiggum of the Springfield County Sheriff's Office seeking all accident reports involving Otto Mann within the last 10 years.
- ▶ Complying with all the requirements of section 552.301, the sheriff's office requests a ruling from the OAG and claims section 552.103 applies to the requested information as litigation in *Krusty T. Clown v. City of Springfield* is currently pending. The sheriff's office states the lawsuit was filed before it received the request for the information, and asserts the requested information relates to the pending litigation. The sheriff's office also sends the OAG a copy of the original petition, which was filed in court six months ago, as proof litigation is pending.
- ▶ Will the sheriff's office be able to withhold the requested information under section 552.103?



Section 552.103 - The Litigation Exception: Hypothetical #4 (Slide 2 of 2)

- ▶ No, the sheriff's office may not withhold the requested information under section 552.103.
- The sheriff's office has failed to show it relates to pending litigation to which the sheriff's office is a party.



Section 552.103 - The Litigation Exception: Hypothetical #4A (Slide 1 of 2)

- ▶ Assuming the facts in the previous scenario, what if the sheriff's office also included in its brief to the OAG an affidavit from the city attorney representing the city wants the information to be withheld?
- ▶ Will the sheriff's office be able to withhold the requested information under section 552.103?



Section 552.103 - The Litigation Exception: Hypothetical #4A (Slide 2 of 2)

- ▶ Yes, the sheriff's office may withhold the requested information under section 552.103 as it has shown it relates to pending litigation to which the city is a party and provides a representation from the city that it wants the information to be withheld on its behalf.



Section 552.103 - The Litigation Exception: Hypothetical #5 (Slide 1 of 2)

- ▶ Another month passes and Mr. Hutz submits a written request for all communications within the last month sent to or from Mayor Quimby pertaining to the Otto/Homer accident. The responsive information includes an e-mail to Homer from Mayor Quimby saying, "You won't get a dime from this city while I'm in office! I'll see you in court!"
- ▶ Complying with all the requirements of section 552.301, the city requests a ruling from the OAG and claims section 552.103 applies to the requested information. In its brief, the city affirmatively states it has received a Notice of Claim letter compliant with the TTCA from Homer prior to the date the request for information was received. The city explains the information directly relates to the anticipated litigation.
- ▶ Will the city be able to withhold the mayor's e-mail to Homer under section 552.103?



Section 552.103 - The Litigation Exception: Hypothetical #5 (Slide 2 of 2)

- ▶ No, the city may not withhold the mayor's e-mail under section 552.103.
- Section 552.103 does not except information that has either been obtained from or provided to the opposing party in the litigation, after the commencement of the litigation posture.



Attorney-Client Privilege (Slide 1 of 7)

What it does

- ▶ **Section 552.107(1) & Texas Rule of Evidence 503 protect:**
 - Communications between and among lawyers, lawyers' representatives, clients, and clients' representatives that were made for the purpose of providing legal services that were intended to be confidential and have remained confidential



Attorney-Client Privilege (Slide 2 of 7)

What must you demonstrate?

- ▶ The information constitutes or documents a communication
 - Notes, research, and reports are generally not communications.
 - Explain how the information at issue was communicated.



Attorney-Client Privilege (Slide 3 of 7)

What must you demonstrate?

- ▶ The communication was made for the purpose of facilitating the rendition of professional legal services to the client governmental body.
 - Explain the legal purpose of the communication.
 - Explain the capacity in which the lawyer is communicating - just because a lawyer is involved does not make the communication privileged.



Attorney-Client Privilege (Slide 4 of 7)

- ▶ The communication is between the client, the lawyer, or their representatives.
 - Identify all parties to the communication and explain their relationship to the governmental body.
 - Don't forget to identify any third-party consultants who have a common interest with the governmental body.

- ▶ The communication was intended to be and has remained confidential.
 - Parties making and receiving the communication intended for the communication to be confidential.
 - The communication has not been shared with any non-privileged party since it was made.



Attorney-Client Privilege (Slide 5 of 7)

What it doesn't do

- ▶ Does not protect information if an attorney is acting in a capacity other than as an attorney
- ▶ Does not except information shared with non-privileged parties
 - This includes separate and apart email chain issues.

Remember: This is a *discretionary* exception to disclosure.



Attorney-Client Privilege (Slide 6 of 7)

What it doesn't do

- ▶ Does not provide a compelling reason to overcome 552.301 violation – *but see City of Dallas v. Paxton*, No. 13-1300397-CV, 2015 WL 601974 (Tex. App.— Corpus Christi Feb. 12, 2015, pet. filed) (mem. op.) – Texas Supreme Court oral arguments were held in September, 2016



Attorney-Client Privilege (Slide 7 of 7)

Separate and Apart Issues

- ▶ You may not withhold an email in an email chain that is communicated to a non-privileged party if the email is separately responsive to the request and exists separate and apart from the submitted email chain.



Section 552.107(1) vs. Rule 503

- ▶ Raise Section 552.107(1) if the information at issue is not subject to Section 552.022.
- ▶ Raise Rule 503 if the information is subject to Section 552.022.
- ▶ Texas Supreme Court held the Texas Rules of Evidence are “other law” for Section 552.022 purposes.
- ▶ Because Section 552.107(1) is not considered “other law” and does not make information confidential under the Act, it will not apply to Section 552.022 information.
- ▶ Rule 503 is not a confidentiality provision and should not be claimed in conjunction with Section 552.101.



Attorney Fee Bills

- ▶ Attorney fee bills are expressly public under section 552.022(a)(16) and no part of the fee bill may be withheld under Section 552.107(1).
- ▶ However, entries in an attorney fee bill that consist of privileged attorney-client communications may be withheld from disclosure under Rule 503.
- ▶ For each particular entry you must show how it (1) reveals a communication, (2) between privileged parties that, (3) was made for the rendition of legal services, and (4) was intended to be and has remained confidential.



Important Fee Bill Points

- ▶ An entire fee bill may not be withheld as a privileged communication in and of itself.
 - Express language of section 552.022(a)(16) does not permit the entirety of an attorney fee bill to be withheld.
- ▶ “Creating,” “drafting” or “preparing” an email, memorandum or document does not indicate the email, memorandum or document was sent/communicated.



Common Issues with Attorney-Client Privilege

- ▶ Identify all parties to the communications.
 - Provide a list or write it on the documents.
 - Stating “all individuals are employees” is not sufficient.
- ▶ Explain how the parties to a communication are privileged.
 - Is a party a consultant, a co-party, or other outside representative?
 - Explain how the outside party shares a common interest with the governmental body.
- ▶ If it is not obvious, explain how the information constitutes a communication.



Section 552.107: Attorney-Client Privilege

Hypothetical #1 (Slide 1 of 6)

- ▶ One year has passed since the close of the *Homer J. Simpson v. City of Springfield* accident case and Otto Mann, the city bus driver, is back at it again. This time he T-bones Mr. Burns' limo as they are coming to an intersection. Mr. Burns' legal team jumps into action and submits a written request to the city for all communications in the city's possession pertaining to Otto's previous accident with Homer.
- ▶ The city releases much of the responsive information and, in compliance with section 552.301, requests a ruling from the OAG for the remaining information. The information the city seeks to withhold consists of a number of e-mails involving various city employees and officials.



Section 552.107: Attorney-Client Privilege

Hypothetical #1 (Slide 2 of 6)

- ▶ In its brief to the OAG, the city argues the e-mails are subject to section 552.107(1).
- ▶ In support of its argument, the city informs the OAG that the e-mails are privileged attorney-client communications between city employees and the city attorney, that were made for the rendition of legal services to the city, and that were intended to be, and have remained, confidential.



Section 552.107: Attorney-Client Privilege Hypothetical #1 (Slide 3 of 6)

From: Charles.Lane@Springfield.city.com
To: Joe.Quimby@Springfield.city.com
cc: Matt.Groening@Springfield.city.com;
James.Brooks@BrooksConsulting.com

Re: Homer/Otto Accident

I've completed my interviews with Otto and several witnesses to the accident. Attached are summaries of each of the interviews and my overall thoughts on the case.

- ▶ Will the city be able to withhold the e-mail under section 552.107?



Section 552.107: Attorney-Client Privilege

Hypothetical #1 (Slide 4 of 6)

- ▶ Will the city be able to withhold the e-mail under section 552.107?
- ▶ No. The city failed to explain James Brooks of Brooks Consulting is a privileged party.



Section 552.107: Attorney-Client Privilege

Hypothetical #1 (Slide 5 of 6)

- ▶ Assuming the facts in the previous scenario, what if the city also included in its brief to the OAG the following table?

Name	Job Title
Charles Lane	City Attorney
Joe Quimby	Mayor
Matt Groening	Director of City Transportation
James Brooks	Specialist in Accident Reconstruction

- ▶ Will the city be able to withhold the e-mail under section 552.107?



Section 552.107: Attorney-Client Privilege

Hypothetical #1 (Slide 6 of 6)

- ▶ Will the city be able to withhold the e-mail under section 552.107?
- ▶ Closer, but no. The city must not only identify who the person is, but also explain the person's relationship to the city.
- ▶ Let's assume, in its brief, the city provided the previous table and also explained Brooks Consulting was hired by the city so it could utilize its expertise in accident reconstruction to determine which party was at-fault and decide the best litigation strategy.
- ▶ In this instance, the city may withhold the e-mail under section 552.107.



Rule 503: Attorney-Client Privilege

Hypothetical #2 (Slide 1 of 6)

- ▶ Kent Brockman, a local news anchor, has become increasingly concerned with how much money the city is spending in legal fees pertaining to Otto's accidents. He sends a written request to the city for "any and all attorney fee bills related to accidents involving Otto Mann."
- ▶ The city, in compliance with section 552.301, requests a ruling from the OAG and seeks to withhold the responsive information under section 552.107.
- ▶ Has the city properly raised the attorney-client privilege?
 - No, the information is subject to section 552.022, and rule 503 is the proper way to raise the privilege.
- ▶ Will the city prevail in its assertion of the attorney-client privilege for the entirety of the responsive information?



Rule 503: Attorney-Client Privilege

Hypothetical #2 (Slide 2 of 6)

- ▶ Will the city prevail in its assertion of attorney-client privilege for the entirety of the responsive information?
- ▶ No. An entire fee bill may not be withheld as a privileged communication in and of itself.
 - Express language of section 552.022(a)(16) does not permit the entirety of an attorney fee bill to be withheld.
- ▶ Let's take a look at the requested fee bill.



Rule 503: Attorney-Client Privilege Hypothetical #2 (Slide 3 of 6)

Castellaneta & Azaria, LLC

Client: City of Springfield

RE: *Homer J. Simpson v. City of Springfield*

Date	Atty	Description of Services	Time	Rate
10/01/16	DC	Conference w/ Mayor Quimby	1.0	300.00
10/01/16	DC	Call to Director Groening	.5	300.00
10/01/16	DC	Call to Mr. Hutz re: discovery	.5	300.00
10/01/16	DC	Draft memo to Mayor Quimby; in-house conf re: hiring consultant; call to Mayor Quimby re: same	2.0	300.00
10/01/16	DC	Conf w/ Azaria re: consultant; draft and sent memo to mayor	1.5	300.00



Rule 503: Attorney-Client Privilege

Hypothetical #2 (Slide 4 of 6)

- ▶ The city should raise the attorney-client privilege of rule 503 of the Texas Rules of Evidence.
- ▶ Each of the elements of the attorney-client privilege under rule 503 must be demonstrated for each separate entry. The city must establish each entry reveals (1) a communication (2) made for the rendition of legal services to the client (3) between privileged parties (4) that was intended to be, and has remained, confidential.
- ▶ The city should identify each person in the fee bill and explain the person's relationship to Springfield.



Rule 503: Attorney-Client Privilege

Hypothetical #2 (Slide 5 of 6)

- ▶ The city includes the following table in its brief to the OAG and explains how all are privileged parties with respect to the communications in the fee bill.

Name	Job Title
Joe Quimby	Mayor
Matt Groening	Director of City Transportation
Lionel Hutz	Opposing Counsel for Homer Simpson
Dan Castellaneta	Outside Counsel for City of Springfield
Hank Azaria	Outside Counsel for City of Springfield

- ▶ The city claims each communication in the fee bill is protected by the attorney-client privilege.
 - What information may the city withhold?



Rule 503: Attorney-Client Privilege

Hypothetical #2 (Slide 6 of 6)

- ▶ The city may protect the following information under rule 503 of the Texas Rules of Evidence:

Date	Atty	Description of Services	Time	Rate
10/01/16	DC	Conference w/ [Mayor Quimby]	1.0	300.00
10/01/16	DC	Call to [Director Groening]	.5	300.00
10/01/16	DC	Call to Mr. Hutz re: discovery	.5	300.00
10/01/16	DC	Draft memo to Mayor Quimby; [in-house] conf [re: hiring consultant]; call to [Mayor Quimby re: same]	2.0	300.00
10/01/16	DC	Conf w/ [Azaria re: consultant]; [draft and sent memo to mayor]	1.5	300.00

- ▶ “Creating,” “drafting,” or “preparing” an e-mail, memorandum, or document does not indicate the e-mail, memorandum, or document was sent.



Section 552.111: Deliberative Process Privilege (Slide 1 of 6)

- ▶ Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.”
- ▶ We have interpreted section 552.111 to incorporate two distinct types of privileges:
 - The deliberative process privilege and
 - The attorney work product privilege



Section 552.111: Deliberative Process Privilege (Slide 2 of 6)

What it does

The purpose of 552.111 is to protect advice, opinions, and recommendations in the decisional process and to encourage open and frank discussion in the deliberative process.

- ▶ Protects from disclosure the advice, recommendations, and opinions found in a given document that relates to a policymaking matter of the governmental body
- ▶ Protects from disclosure the entire contents of a **policymaking** draft document that is intended for **public release in its final form**



Section 552.111: Deliberative Process Privilege (Slide 3 of 6)

Communications with Third Parties:

Privity of Interest and Common Deliberative Process

- ▶ 552.111 can encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest or common deliberative process.
- ▶ The governmental body **must** explain how outside parties share a privity of interest or common deliberative process.



Section 552.111: Deliberative Process Privilege (Slide 4 of 6)

What must you demonstrate?

- ▶ How the information at issue relates to the governmental body's policy mission
- ▶ Identify the parties. If the information involves officials or employees of your governmental body, explain who they are and why they are qualified to make policy.
- ▶ Identify consultants and explain the task he or she is performing for your governmental body.



Section 552.111: Deliberative Process Privilege (Slide 5 of 6)

What must you demonstrate? (con.)

- ▶ If another governmental entity is involved, explain why your governmental body has a privity of interest or shares a common deliberative process with the other entity.
- ▶ If the information at issue is a draft of a document, explain how it qualifies as a policymaking document and state whether the draft has been or will be released in its final form.



Section 552.111: Deliberative Process Privilege (Slide 6 of 6)

What it doesn't do

- ▶ Does not encompass purely factual information that is severable from opinion
- ▶ Does not encompass routine internal administrative or personnel matters
- ▶ Does not make information subject to 552.022 confidential
- ▶ Does not provide a compelling reason to overcome 552.301 procedural violation

Remember: This is a *discretionary* exception to disclosure.



Common Issues with Deliberative Process Privilege

- ▶ Failure to identify the parties in the information at issue
- ▶ Failure to explain how outside parties share a privity of interest or common deliberative process with the governmental body regarding the information at issue
- ▶ Failure to explain how the information at issue relates to the governmental body's policymaking functions
- ▶ Failing to state whether draft documents have been or will be released to the public in their final form



Section 552.111 – Deliberative Process: Hypothetical #1 (Slide 1 of 6)

The City of Springfield is having serious problems with the local landfill. Some residents of Springfield are dumping hazardous materials which is affecting the health of the plants and animals in and around the landfill. Tourism is also being negatively impacted as visitors are being driven away from the surrounding city park due to the deteriorating conditions.

Mayor Quimby and his staff are trying to think outside the box to come up with new policies to curb the pollution problem while simultaneously organizing restoration efforts to bring the city park back to its former glory. With this goal in mind, they have had several meetings and exchanged numerous e-mails discussing and debating the best available course of action.



Section 552.111 – Deliberative Process: Hypothetical #1 (Slide 2 of 6)

Lisa Simpson, being the concerned environmentalist that she is, wants to know what the city's plans are for cleaning up the landfill before irreparable damage has been done to the ecosystem. Lisa makes a written request to the city seeking "any and all communications, notes, or other documents pertaining to the restoration of the Springfield dump."

The city attorney, complying with the requirements of section 552.301, requests an OAG ruling and raises the deliberative process aspect of section 552.111 for the responsive information.



Section 552.111 – Deliberative Process: Hypothetical #1 (Slide 3 of 6)

In her brief, the city attorney explains the regulation of the Springfield landfill and the surrounding park area is under the purview of the city's Parks and Recreation Department (P&RD).

The city attorney also explains Mayor Quimby, the city manager, the director of the P&RD, and the director's staff have recently held meetings and shared e-mails discussing and debating the best course of action to take concerning the pollution. She sends in a table identifying each person who is addressed in the responsive documents and lists the job titles they each held for the city.



Section 552.111 – Deliberative Process: Hypothetical #1 (Slide 4 of 6)

The city attorney argues these efforts directly relate to the city's policymaking mission of providing, protecting, and preserving a park system that provides quality outdoor experiences for the residents of Springfield.

The responsive information includes an e-mail from the director of the P&RD to Mayor Quimby. The message reads, "Pollution in the area of the landfill has increased by 50% from last year. I think we should look into implementing a fine for people who are illegally dumping toxic waste. I also just wanted to let you know, I don't really like the sprinkle donuts served at every meeting."

- Will the city be able to withhold the e-mail under section 552.111?



Section 552.111 – Deliberative Process: Hypothetical #1 (Slide 5 of 6)

Yes, in part:

- ▶ The city may withhold the information consisting of advice, opinion, or recommendation pertaining to policymaking of the city: “I think we should look into implementing a fine for people who are illegally dumping toxic waste.”

No, in part:

- ▶ The city may not withhold purely factual information: “Pollution in the area of the landfill has increased by 50% from last year.”
- ▶ The city may not withhold advice or opinion that does not pertain to policymaking: “I also just wanted to let you know, I don’t really like the sprinkle donuts served at every meeting.”



Section 552.111 – Deliberative Process: Hypothetical #1 (Slide 6 of 6)

- ▶ The city met all the requirements of section 552.301.
- ▶ The city identified the parties in the information at issue.
- ▶ The city explained that the information pertains to the city's policy-making functions.



Section 552.111 – Deliberative Process: Hypothetical #2 (Slide 1 of 4)

Mayor Quimby decides that a skilled hand is needed to help lead the restoration efforts. He decides that Lisa is the perfect candidate and decides to hire her as a consultant. After some negotiating with Mayor Quimby via e-mail, Lisa decides to accept the position on the condition that she will also draft new policies that will be implemented after the restoration is complete to minimize the chances of the landfill and surrounding park returning to its polluted state.

Marge, Lisa's mother, is interested in learning what was said during the negotiations with her daughter and wants to look at some of the draft documents that Lisa is working on. Marge submits a written request for "all communications pertaining to the hiring of Lisa Simpson and a copy of the policies she has drafted."



Section 552.111 – Deliberative Process: Hypothetical #2 (Slide 2 of 4)

The city attorney, complying with the requirements of section 552.301, requests an OAG ruling and raises the deliberative process aspect of section 552.111 for the responsive information. In her brief, the city attorney explains the regulation of the Springfield landfill and the surrounding park area is under the purview of the city's P&RD. The city attorney argues these efforts directly relate to the city's policymaking mission of providing, protecting, and preserving a park system that provides quality outdoor experiences for the residents of Springfield.

The city attorney also explains Mayor Quimby hired Lisa to lead the restoration efforts and draft policies which will be released in their final form once they have received approval.

- Will the city be able to withhold the responsive information under section 552.111?



Section 552.111 – Deliberative Process: Hypothetical #2 (Slide 3 of 4)

Will the city be able to withhold the responsive information under section 552.111?

Yes, in part. The city may withhold the draft policies since the city attorney explained:

- ▶ the draft policies pertain to the policymaking function of the city,
- ▶ the city shares a privity of interest with Lisa Simpson as she is a consultant to the city, AND
- ▶ the draft policies will be released to the public in their final form.



Section 552.111 – Deliberative Process: Hypothetical #2 (Slide 4 of 4)

Will the city be able to withhold the remaining responsive information under section 552.111?

No:

- ▶ The city may not withhold the negotiation e-mails between Mayor Quimby and Lisa as a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.



Section 552.111: The Attorney Work Product Privilege (Slide 1 of 5)

- ▶ **What does the attorney work product privilege protect?**
 - Material prepared for and mental impressions developed, as well as communications made, in anticipation of litigation or for trial, by or for a party or its representatives



Section 552.111: The Attorney Work Product Privilege (Slide 2 of 5)

► What must you demonstrate?

- The information at issue consists of material or mental impressions developed by or for your governmental body in anticipation of litigation or for trial

OR

- The information at issue is a communication made between your governmental body and its representatives in anticipation of litigation or for trial



Section 552.111: The Attorney Work Product Privilege (Slide 3 of 5)

► What is “Anticipation of litigation”?

- A reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue

AND

- The party resisting disclosure believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation



Section 552.111: The Attorney Work Product Privilege (Slide 4 of 5)

► Anticipation of litigation

- A substantial chance of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.”
- The applicability of the work product privilege depends on the facts and circumstances that existed when the information was created.



Section 552.111: The Attorney Work Product Privilege (Slide 5 of 5)

► What must you demonstrate?

- Identify the parties or potential parties to litigation,
- Identify the person or entity that prepared the information, *and*
- Identify any individual with whom the information was shared.



Texas Rule of Civil Procedure 192.5: (Slide 1 of 2)

- ▶ The Texas Rules of Civil Procedure are “other law” for purposes of section 552.022. Therefore, information subject to section 552.022 may be withheld under the attorney work product privilege of Texas Rule of Civil Procedure 192.5.
- ▶ Information is privileged under rule 192.5 only to the extent the information implicates the core work product aspect of the attorney work product privilege.
- ▶ Note: The privilege under rule 192.5 is narrower than under section 552.111.



Texas Rule of Civil Procedure 192.5: (Slide 2 of 2)

- ▶ In claiming the core attorney work product privilege of rule 192.5, a governmental body must demonstrate the information was
 - (1) created for trial or in anticipation of litigationand
 - (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative.



Section 552.111 – Attorney Work Product: Hypothetical #1 (Slide 1 of 4)

- ▶ While doing research into the effects of the pollution on the ecosystem of the Springfield landfill and surrounding park, the director of the P&RD discovered that Cletus Spuckler, a local resident, has been hunting in the landfill every night for the past three months.
- ▶ After notifying Mayor Quimby and the city of this discovery, the city attorney prepared a memo detailing the city's potential defenses against any claims Cletus could bring against the city. Later that day, the city attorney sends another memo to Mayor Quimby generally outlining the city's potential defenses against various tort claims, should they potentially occur at some point in the future.



Section 552.111 – Attorney Work Product: Hypothetical #1 (Slide 2 of 4)

- ▶ Soon thereafter, Cletus became ill and hired Mr. Hutz to represent him in any potential civil claims he has against the city. Mr. Hutz submitted a written request to the city for “any communications between the city attorney and Mayor Quimby within the last week.”
- ▶ The city attorney, complying with the requirements of section 552.301, requests an OAG ruling and raises the attorney work product privilege of section 552.111 for the responsive memos.



Section 552.111 – Attorney Work Product: Hypothetical #1 (Slide 3 of 4)

- ▶ The city argues the memos are excepted from disclosure under the attorney work product privilege encompassed by section 552.111, as:
 - The memos consists of the mental impressions of the city attorney,
 - Were prepared by the city attorney and his staff,
 - Were prepared in anticipation of ligation to which the city is a party, AND
 - The memos are related to the anticipated litigation.

- ▶ May the city withhold the responsive memos under section 552.111?



Section 552.111 – Attorney Work Product: Hypothetical #1 (Slide 4 of 4)

- ▶ May the city withhold the responsive memos under section 552.111?
- ▶ Yes, in part:
 - The city may withhold the Cletus Defense Memo under section 552.111 because the city has shown the memo represents the mental impressions of the city attorney, was prepared by the city attorney in anticipation of litigation to which the city will be a party, and the memo is related to that litigation.
- ▶ No, in part:
 - The city may not withhold the General Defense Memo under the work product privilege of section 552.111 because the city did not demonstrate the memo was prepared in anticipation of litigation that was more than merely an abstract possibility.



Common Mistakes in Claiming the Privileges of Section 552.111 (Slide 1 of 4)

The best ways to lose your argument under the deliberative process privilege of section 552.111

- ▶ Failure to identify the parties in the information at issue;
- ▶ Failure to explain how outside parties share a privity of interest or common deliberative process with your governmental body regarding the information at issue;
- ▶ Failure to explain how the information at issue relates to your governmental body's policymaking functions;



Common Mistakes in Claiming the Privileges of Section 552.111 (Slide 2 of 4)

- ▶ Failure to explain why the information consists of advice, opinion, and recommendation relating to policymaking, rather than factual and administrative information that does not relate to policymaking;
- ▶ Failure to state whether draft documents have been, or are intended to be, released to the public in their final form; OR
- ▶ Failure to comply with the procedural requirements of section 552.301.



Common Mistakes in Claiming the Privileges of Section 552.111 (Slide 3 of 4)

The best ways to lose your argument under the attorney work product privilege of section 552.111

- ▶ Failure to identify the parties in the information at issue;
- ▶ Failure to explain that the information consists of material or mental impressions developed by or for, or communications between representatives of, your governmental body;
- ▶ Failure to explain that the information was made or developed in anticipation of litigation or for trial;



Common Mistakes in Claiming the Privileges of Section 552.111 (Slide 4 of 4)

- ▶ Failure to identify the person or entity that prepared the information;
- ▶ Failure to identify the parties or potential parties to litigation;
OR
- ▶ Failure to comply with the procedural requirements of section 552.301.



Transactional Exceptions and Third-Party Interests

- ▶ Gov't Code § 552.104
- ▶ Gov't Code § 552.105
- ▶ Gov't Code § 552.108 – proper custodian
- ▶ Gov't Code § 552.110
- ▶ Gov't Code § 552.305



Other Exceptions May Also Apply

- ▶ These sections are not exclusive.
 - Don't forget to raise any other applicable exceptions such as:
 - Gov't Code § 552.103 (litigation exception)
 - Gov't Code § 552.107 (attorney-client privilege)
 - Gov't Code § 552.111 (work product/deliberative process privileges)



Recent Court Decision

- ▶ *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015)



Boeing Co. v. Paxton

- ▶ *Boeing* made major changes to the application of section 552.104:
 - Third parties may raise section 552.104.
 - The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.”



Section 552.104 Interests

- ▶ Section 552.104 protects the following types of competitive bidding interests:
 - **Governmental Body's Competitive Interest:** protects a governmental body's interest in receiving competitive bids;
 - **Governmental Body's Marketplace Interest:** protects a governmental body's interest when actually competing in the marketplace; and
 - **Third Party's Competitive Interests:** protects a third party's interest to protect competitively sensitive information.



Section 552.104 is Discretionary

- ▶ Section 552.104 is discretionary, but a third party may raise it.
- A governmental body waives its own section 552.104 interests if it does not comply with section 552.301
- **But** a third party may raise section 552.104 even if a governmental body does not comply with section 552.301



Sections 552.104 & 552.022

- ▶ Section 552.104 prevails over section 552.022.
- ▶ Gov't Code § 552.022(a)(1): completed reports, audits, evaluations, investigations
- ▶ Gov't Code § 552.022(a)(3): information in account, voucher, or contract relating to the receipt or expenditure of public or other funds
- ▶ For many years, the OAG considered the terms of a contract, and especially the pricing of a winning bidder, to be public and generally not excepted from disclosure. After *Boeing*, third parties can raise section 552.104 to withhold information contained in executed contracts between the third party and a governmental body.



Section 552.104: GB's Competitive Interests (Slide 1 of 2)

- ▶ Governmental body seeks to acquire particular goods or services, e.g.,
 - City's RFP for computer software
 - School district's RFP for athletic equipment
 - Police department's RFP for upgrade to video recording equipment and software



Section 552.104: GB's Competitive Interests (Slide 2 of 2)

- ▶ What must a governmental body demonstrate?
 - There is a competitive bidding situation
 - There is more than one bidder or competitor
 - Release of information would give an advantage to one bidder over another



Section 552.104: GB's Marketplace Interests (Slide 1 of 2)

- ▶ Governmental body competes with others in providing or acquiring goods or services.

- ▶ Examples
 - City competes with other cities to contract with a musical act to perform at a city-owned venue
 - University markets its research discoveries and licensing of patented technology
 - A state agency competes with agencies from other states for grant funding



Section 552.104: GB's Marketplace Interests (Slide 2 of 2)

- ▶ What must a governmental body prove?
 - The governmental body is actually competing in the marketplace and has a specific marketplace interest; *and*
 - Release of information would give an advantage to a competitor of the governmental body.



Section 552.104: Third-Party's Competitive Interests

- ▶ The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.”
- ▶ This test is the same for both governmental bodies and third parties raising section 552.104.



Section 552.104 – Competitive Bidding: Hypothetical #1 (Slide 1 of 2)

- ▶ The City requests a bid to erect a memorial statue to BBQ. StatuesRUs, Inc. submits the only bid in response to the Request for Proposal. Later, the city receives an open records request for StatuesRUs's proposal. The city seeks a ruling to withhold the information under section 552.104.
- ▶ Will the city be able to withhold the information under 552.104?



Section 552.104 – Competitive Bidding: Hypothetical #1 (Slide 2 of 2)

- ▶ Will the city be able to withhold the information under 552.104?
- ▶ No. As there is only one entity seeking the contract in this situation, the process cannot be said to be competitive. The city has no ongoing process that would be harmed by its release. Therefore the interest of the city that section 552.104 is designed to protect is not present in this situation.



Section 552.104 – Competitive Bidding: Hypothetical #2 (Slide 1 of 2)

- ▶ The City requests a bid to build an auditorium. Two vendors submit bids in response to the Request for Proposal; however, an unexpected natural disaster depletes the city budget and the RFP is cancelled and then reissued for the next fiscal year. Best Auditoriums, Inc. submits an open records request for the proposals under the cancelled RFP.
- ▶ Will the city be able to withhold the information under 552.104?



Section 552.104 – Competitive Bidding: Hypothetical #2 (Slide 2 of 2)

- ▶ Will the city be able to withhold the information under 552.104?
- ▶ Yes. If the city informs the OAG that no contract was signed and they will be seeking future bids for that project, the city will be able to withhold the information under section 552.104. Release of the previous proposals would give Best Auditoriums an advantage that would damage the city's ability to receive a competitive bid for the later RFP for the same project.



Section 552.104 – Competitive Bidding: Hypothetical #3 (Slide 1 of 2)

- ▶ The City resolves to build a new purple pagoda on the town square. Six vendors respond to the request for proposal. Before the contract is awarded, one of the vendors submits an open records request asking to see the other submitted proposals.
- ▶ Will the city be able to withhold the information under 552.104?



Section 552.104 – Competitive Bidding: Hypothetical #3 (Slide 2 of 2)

- ▶ Will the city be able to withhold the information under 552.104?
- ▶ Yes. If the city informs the OAG that no contract was signed and the bidding process is still ongoing, the city will be able to withhold the information under section 552.104. Release of the proposals while the bidding process is still competitive would result in an advantage to the requesting bidder at the expense of others, which would undercut the city's ability to get the best terms.



Section 552.104 – Competitive Bidding: Hypothetical #4 (Slide 1 of 2)

- ▶ The City wishes to lure the “World’s Greatest Pizza Festival” away from the County. The County has submitted a proposal to hold the 2016 festival. The City submits an open records request for information regarding the County’s proposal to the festival organizers.
- ▶ Will the County be able to withhold the information under 552.104 if it can show other governmental bodies wish to attract the festival to their locales?



Section 552.104 – Competitive Bidding: Hypothetical #4 (Slide 2 of 2)

- ▶ Will the County be able to withhold the information under 552.104 if it can show other governmental bodies wish to attract the festival to their locales
- ▶ Yes. The county is competing in the marketplace to host the festival and release of the terms of the contract would give an advantage to its competitors.



Section 552.105

- ▶ 552.105 is designed to protect a governmental body's planning and negotiating position with respect to a particular transaction.
- Excepts from public disclosure information related to:
 - The location of real or personal property for a public purpose **prior** to public announcement of the project; or
 - Appraisals or purchase price of real or personal property for a public purpose **prior** to the formal award of contracts for the property



Section 552.105 is Discretionary

- ▶ Section 552.105 is discretionary.
 - It does not provide a compelling reason to overcome a section 552.301 violation



Sections 552.105 & 552.022

- ▶ Information subject to section 552.022 may not be withheld under section 552.105.
- ▶ Completed appraisal reports and attachments are not “completed reports” for purposes of section 552.022(a)(1). Thus, a governmental body may withhold a completed appraisal report under section 552.105.



Section 552.105 Elements

- ▶ What must a governmental body demonstrate?
 - That it seeks to acquire property
 - That the location of the property in question has not been announced or the transaction has not been completed
 - That it has made a good faith determination that release of the requested information would damage its negotiating position to acquire the property



Section 552.105: Other Issues

- ▶ Section 552.105 protects the governmental body's interest, not the interests of third parties.
- ▶ Section 552.105 is temporal in nature; its protection ends once the location of the property in question is publicly announced or the transaction is completed.



Section 552.105: Hypothetical #1 (Slide 1 of 2)

- ▶ The City publicly announces it will acquire 10 acres to construct a public aquatic water park for dogs. The city council has narrowed down its final choices to three locations as potential sites; but has not made a final choice. Insoluble Pet Treats, LLC, submits an open records request asking for all potential locations for the future park.
- ▶ Will the city be able to withhold the information under 552.105?



Section 552.105: Hypothetical #1 (Slide 2 of 2)

- ▶ Will the city be able to withhold the information under 552.105?
- ▶ Yes. Although the city has announced the existence of the project, it has not announced the location of the property in question and the transaction is still ongoing. If the city can show it made a good faith determination that its negotiation position regarding the properties would be damaged by the release of the information, it may withhold the information.



Section 552.108: Proper Custodian

Proper Custodian – Common Issues

- ▶ If you are not a law enforcement agency and you raise 552.108 as the proper custodian of the information for a law enforcement agency or prosecutor, you must:
 - Demonstrate the information relates to a pending case of a law enforcement agency.
 - Provide a representation from the law enforcement agency that it wants the information withheld.



Section 552.108 – Proper Custodian Hypothetical #1 (Slide 1 of 2)

- ▶ City High School's principal is investigating rumors of drug use amongst students on school grounds. The principal has contacted the local law enforcement agency and relayed the information gathered by the investigation. Subsequently, City Independent School District receives an open records request regarding any ongoing investigations involving student drug use.
- ▶ May the school district withhold the information the principal has compiled under section 552.108 without further contacting the local law enforcement agency?



Section 552.108 – Proper Custodian Hypothetical #1 (Slide 2 of 2)

- ▶ May the school district withhold the information the principal has compiled under section 552.108 without further contacting the local law enforcement agency?
- ▶ No. Section 552.108 may only be raised by the proper custodian of information for a law enforcement agency or prosecutor and the ISD is not a law enforcement agency. Although the ISD has contacted law enforcement, it may not assert 552.108 on their behalf.
- ▶ In order to withhold the information under section 552.108, the OAG must receive a statement from the law enforcement agency or prosecutor that the information relates to a pending investigation.



Section 552.110

- ▶ Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information:
 - Trade secrets
 - Commercial or financial information, the release of which would cause a third-party substantial competitive harm



Section 552.305

- ▶ Notifying interested third parties:
 - If release of the requested information implicates the proprietary interests of a third party, then the governmental body must make a good faith effort to notify each third party of the request.



Section 552.110 is Compelling

The interests of third parties provide a compelling reason to overcome a section 552.301 violation. Thus, a third party may raise section 552.110, even if a governmental body does not comply with the time deadlines required under section 552.301, or if the governmental body does not raise these exceptions.



Sections 552.110 & 552.022

- ▶ Information subject to section 552.022 may be withheld under section 552.110.



552.110 Elements

- ▶ Section 552.110 may only be raised by a third party, not a governmental body. Thus, a governmental body may not claim section 552.110.



Section 552.110: Common Issues

- ▶ Tell us who the winning bidder was.
- ▶ Provide us with a mailing list of the third parties you notified pursuant to section 552.305.
- ▶ You must submit all of the information at issue – no representative samples.



Required Posting of Certain Contracts (Slide 1 of 2)

- ▶ Gov't Code § 2261.253(a)
 - Requires a state agency to post on its Internet website each contract for the purchase of goods or services from a private vendor the agency enters into, until the contract expires or is completed

- ▶ Gov't Code 2157.0685(b)(2)
 - Requires a state agency to post on its Internet website each statement of work entered into by the agency related to a contract awarded by the Texas Department of Information Resources under section 2157.068 that requires a state agency to develop and execute a statement of work to initiate services under the contract



Required Posting of Certain Contracts (Slide 2 of 2)

- ▶ Remember - information specifically made public by statute may not be withheld under the general exceptions to public disclosure in the Act.
- ▶ Thus, information required to be posted under section 2261.253 or section 2157.0685 may not be withheld under section 552.104 or section 552.110.
- ▶ Letter rulings addressing the posting requirements under sections 2261.253 and 2157.0685 may be found on the OAG website.



Questions

OAG Open Government Hotline
(877) OPEN-TEX

OAG Website

<https://www.texasattorneygeneral.gov/open/index.shtml>